b. Discussion of the Age of the Claims. One of the important issues cited by the DOI in recommending an extension of the statute of limitations was the complication of factual and legal development for claims that "go back to the 18th and 19th centuries." *See* H.R. REP. NO. 95-375, at 6 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1616, 1621 (letter from the DOI stating the agency's views). During the debate, Representative Danielson noted that "as recently as 1966 there was no statute of limitations whatever upon actions brought by the U.S. Government on behalf of its wards, the Indians, none whatsoever. A claim could be 1 year old, or 10 years old, or 50 years old, or 100 years old. The statute of limitations did not run against the U.S. Government in actions which it brought." 126 CONG. REC. 5744-5745 (1980).

On the House floor, in 1977, Representative Foley argued against the extension of the limitations period on the ground that "[l]ong after the statute of limitations would have barred any possible actions for trespass . . . we are keeping alive Indian claims, and we are allowing their resuscitation and indeed their prosecution by the full weight of the Federal Government . . . " 123 CONG. REC. 22,500 (1977). He further stated that "I believe that even among those who for various reasons feel compelled to support the bill are concerned about the basic inequity and injustice of reaching back as far as 180 years in prosecuting Indian claims that long ago would have been extinguished by any other rule of law against any other citizens in this country." *Id.* at 22,502. This sentiment did not prevail.

The prevailing sentiment was articulated by Representative Weiss who supported the bill because "as a result of the numerous injustices suffered by American Indians

during the last 150 years – many at the hands of the American Government – it is incumbent on the United States to give these people – our country's first inhabitants – a full chance to redress their grievances. . . .[T]his measure does not side with the Indian nations on these claims; it merely helps assure that these claims are decided fairly and equitably." *Id.* at 22,171 (statement of Rep. Weiss). Similarly, Representative Risenhoover stated, "We should not let this artificial, man-made barrier – the statute of limitations – run out until we are satisfied that all claims are fully reviewed and until this Government has faithfully performed its stewardship." *Id.* at 22,504.

c. Discussion of the Local Impacts. The fact that these lawsuits could impact the local communities was made clear throughout the debates. For example, Representative Hanley referred to the Oneida claims and the fact that long years of litigation could "wreck the economy of the region." *Id.* at 22,170. Opponents of the extension proclaimed that "[t]he situation would be ludicrous if it were not so serious and if the very homes and property of the people in this country were not affected and were not endangered." *Id.* at 22,169 (statement of Rep. Moorhead). *See also* Testimony of Maine Attorney General Joseph Brennan, 1977 Hearings at 77 ("[P]ending litigation has resulted in economic hardship and clouded titles in areas subject to claims.") (internal quotes omitted). (Notably, money damages were not discussed as one of the factors of concern.)

Despite the age of the claims, the stated objections, and the knowledge of these hardships, Congress continued the extensions without ever questioning the timeliness of these claims or the fact that, in its judgment, the Indians who would be impacted by the statute of limitations

deserved the opportunity to have their claims heard. "Certainly, the position of the Congress should be that if wrongs have been committed under the laws of the United States, those wrongs ought to be investigated and prosecuted to judgment, especially if it is the responsibility of the United States to prosecute such wrongs." 123 CONG. REC. 22,171 (1977) (statement of Rep. Johnson). *See also* S. REP. NO. 96-569, at 5 (1980) ("Failure to extend the time limits now provided will, unnecessarily, bar many meritorious claims of Indian tribes. . . .* * *In addition to providing additional time for the processing of those claims thus far identified, fairness to the Indian people dictates that additional time be provided for the orderly investigation, identification and processing of remaining claims.").

4. The 1982 Limitations Act Identified Indian Claims and Preserved Them.

Finally, in 1982, Congressional patience with the Department's continued requests for extensions of the limitations period had worn thin.[9] A plan emerged to bring finality to the claims identification process and to set a limitations period once and for all for Indian claims seeking money damages for claims such as trespass.

The Indian Claims Limitation Act of 1982 carries out that plan. The provisions of § 2415 and the Indian Claims Limitation Act establish Congress' considered policy

---

[9] H.R. REP. NO. 97-954, at 5, 9 (1982) ("Because of the repeated failure of the United States in fulfilling its responsibility to identify, research, evaluate, and process such Indian claims, Congress extended the statute two additional times – once in 1977 and again in 1980. * * * [T]he Committee was not persuaded that [another] simple extension of the Statute for suits by the United States would be adequate.").

judgment, after years of hearings and debate, that it was necessary to bring finality to pre-1966 Indian claims sounding in tort for money damages. The Act directed the Department to compile and publish in the Federal Register a list of pre-1966 damages claims. The claims on this list were preserved. All other claims are barred.[10]

> "*Any right of action shall be barred sixty days after the date of the publication of the list* required by section 4(c) of this Act for those pre-1966 claims which, but for the provisions of this Act, would have been barred by section 2415 of title 28, United States Code, *unless such claims are included on either of the lists* required by section 3 or 4(c) of this Act."

28 U.S.C. § 2415 note, Sec. 5 (emphasis added). Significantly, § 2415(b) establishes the accrual date for these claims. Section 2415(b) permits claims to be brought "within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe . . . which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought on or before sixty days after the date of the publication of the list required by section 4(c) of the Indian Claims Limitation Act of 1982." 28 U.S.C. § 2415(b). By setting this accrual date, Congress provided a date certain from which to measure their timeliness for limitations purposes. By operation of law, even if the events surrounding the land claims occurred many years ago, such claims are deemed to have accrued in 1982 if that claim appears on the list compiled by the Secretary. If Congress did not

[10] Claims for title are not covered by the list but are governed by 28 U.S.C. § 2415(c).

intend that these claims be protected or deemed newly accrued, then it knew how to prevent it.[11]

Once identified and placed on the list, the statute of limitations is tolled for those claims until the Secretary acts. Petitioners' and Amici's land claims appear on this list and thus fall within the parameters of the Act. 48 Fed. Reg. 13,698, 13,920 (Mar. 31, 1983).

With the list set, the Secretary has the option of filing suit on behalf of a tribe as part of its trust duty. It has done so on behalf of the Petitioners and the Amici. The Secretary may also either reject a claim for litigation, in which case the claim is barred unless a tribe files suit within one year, 28 U.S.C. § 2415 note, Sec. 5(b), or the Secretary may submit a proposed legislative solution to Congress, in which case the claim will be barred unless suit is filed within three years. *Id.* at Sec. 6. When the first list was published in 1983, the Secretary noted "It is important to remember that for claims contained on either of the lists, the statute of limitations does not begin to run until such time as the Secretary formally rejects a claim or submits to Congress a legislative proposal or report." 48 Fed. Reg. 13,698 (Mar. 31, 1983). Indeed, this Court recognized that "[s]o long as a listed claim is neither acted upon nor formally rejected by the Secretary, it remains live." *Oneida II*, 470 U.S. at 243.

---

[11] *See, e.g.*, 15 U.S.C. § 15b, in which Congress specifically provided that the establishment of a new statute of limitations would not reset the accrual date up to the effective date of the Act ("No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.").

B. The Second Circuit's Ruling Conflicts with *Oneida II* and Settled Law that Precludes the Adoption of Common Law Contrary to a Federal Statute.

In *Oneida II*, this Court detailed the history of § 2415 and the extent of the actions taken by Congress to protect these claims from a time bar. 470 U.S. at 241-244. This Court recognized that "the statutory framework adopted in 1982 presumes the existence of an Indian right of action not otherwise subject to any statute of limitations," *id.* at 244, and concluded that it could not impose a judicially crafted time bar by borrowing the state statute of limitations since to do so "would be inconsistent with federal policy." *Id.* at 241. *See* Petition for Writ of Certiorari of Petitioner Cayuga Indian Nation, et al. at 20, Cayuga Indian Nation of New York, et al. v. Pataki, et al., No. 05-982 (U.S. Feb. 3, 2006); Petition for Writ of Certiorari of Petitioner United States at 21-24, United States v. Pataki, et al., No. 05-978 (U.S. Feb. 3, 2006). While this Court formally reserved its judgment as to laches because the defendants had waived the issue, its reasoning applies equally to the laches doctrine.

Immediately after the initial adoption of § 2415 in 1966, lower courts rejected the assertion of the laches defense for claims accruing prior to its enactment because of the statutorily mandated later accrual date. *See, e.g., Cassidy Commission Co. v. United States*, 387 F.2d 875, 880 n.9 (10th Cir. 1967) (action not barred by laches either under common law rule or because under § 2415, Congress provided for date when claims accrue); *United States v. Sabine Towing and Transp. Co.*, 289 F. Supp. 250, 253 (E.D. La. 1968) (argument that United States should be subject to laches is "without merit" because § 2415 defined

the coverage of the statute by setting an accrual date and claim was filed within the statutory timeline).

This Court's reasoning in *Oneida II* implicitly confirms these decisions since they recognize that common law cannot be applied in the face of § 2415. The Second Circuit's ruling conflicts with this Court's clear instruction to defer to Congressional judgment on the matter of limitations for these claims.

The Second Circuit not only ignored the Court's reasoning in *Oneida II*, it also declined to recognize the longstanding rule that federal common law may not apply when it conflicts with statutory law. Once Congress has established a federal limitations period for Indian trespass claims for money damages, the Second Circuit is not now free to adopt common law rules that conflict with this statutory scheme. This Court has long recognized "that federal common law is 'subject to the paramount authority of Congress.'" *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313 (1981) (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)). "[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.* at 314. In adopting the doctrine of laches to dismiss the claims, the Second Circuit raised federal common law above an Act of Congress usurping the legislative will of Congress.

When an Act of Congress "speak[s] directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Higginbotham*, 436 U.S. at 625. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and

specifically enacted." *Id.* In a statement that can only be considered prescient, this Court recognized that "[i]n the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." *Id.* Yet this is precisely what the Second Circuit did. As this Court has recognized, it has "no authority to substitute our views for those expressed by Congress in a duly enacted statute." *Id.* at 626.

Nowhere is this more true than when Congress is acting in the area of Indian affairs. This Court has consistently recognized that "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004) (citations omitted). That power "is drawn both explicitly and implicitly from the Constitution itself" and in particular, from the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, and the Treaty Power, U.S. CONST. art. II, § 2, cl. 2. *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974). As this Court has said, "[t]he 'central function of the Indian Commerce Clause . . . is to provide Congress with plenary power to legislate in the field of Indian affairs.'" *Lara*, 541 U.S. at 200 (citations omitted).

Yet by invoking the common law doctrine of laches, the Second Circuit has completely disregarded and, indeed, overridden, the will of the Congress, a result expressly rejected by this Court in *Oneida II*, 470 U.S. at 244.

CONCLUSION

The petitions for writ of certiorari should be granted.

Respectfully submitted,

MARSHA KOSTURA SCHMIDT*
HOBBS, STRAUS, DEAN & WALKER, LLP
2120 L Street, N.W.,
Suite 700
Washington, D.C. 20037
(202) 822-8282

Counsel for the St. Regis Mohawk Tribe

JAMES T. MEGGESTO
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street, N.W.,
Suite 600
Washington, D.C. 20005
(202) 682-0240

Counsel for Mohawk Council of Akwesasne

**Counsel of Record for Amici*

Of Counsel
HOBBS, STRAUS, DEAN & WALKER, LLP
ELLIOTT MILHOLLIN

April 7, 2006